

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 17, 20.) Attorney Donald C. Bell represents Plaintiff; Special Assistant United States Attorney Willy M. Le represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 6.) After reviewing the administrative record and briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment, and directs entry of judgment for Defendant.

JURISDICTION

On October 3, 2006, Ginger Spanetti (Plaintiff) protectively filed an application for Supplemental Security Income benefits (SSI). (Tr. 84-86.) She alleged disability due to porphyria cutanea tarda (PCT) initially, and depression during appeal proceedings. (Tr. 108, 134.) She alleged she was unable to work due PCT as of September 1, 2000. (Tr. 108.) The onset date was amended to August 1, 2003, at the hearing. (Tr. 13.) Benefits were denied initially and on reconsideration. Plaintiff requested a hearing before an administrative law judge (ALJ), which was held on January 15, 2009, before ALJ R. S. Chester. (Tr. 8-34.) Plaintiff, who was represented

1 by counsel, and vocational expert Tom Moreland (VE) testified. The
2 ALJ denied benefits on February 11, 2009, (Tr. 40-50) and the
3 Appeals Council denied review. (Tr. 51-53.) The instant matter is
4 before this court pursuant to 42 U.S.C. § 405(g).

5 **STATEMENT OF THE CASE**

6 The facts of the case are set forth in detail in the transcript
7 of proceedings and are briefly summarized here. At the time of the
8 hearing, Plaintiff was 50 years old with three adult children. She
9 was living alone in a trailer on her step-father's property. (Tr.
10 246-47.) Plaintiff reported a tenth-grade education and
11 certification as a nurse's assistant. (Tr. 12.) She has past work
12 experience as a house cleaner, sod layer, food server, agricultural
13 sorter, orchard laborer, and in-home care giver. (Tr. 24-25.)
14 Plaintiff testified she doubted she could lift ten pounds due to
15 shoulder pain; she could sit with a change in position every 20 to
16 30 minutes, could stand 20 minutes and walk less than two blocks.
17 (Tr. 15.) She also testified she had problems with gripping and
18 handling. (Tr. 16.) She reported she had problems being around
19 people and suffered anxiety attacks. (Tr. 19.) Plaintiff has a
20 significant history of alcohol abuse. (Tr. 247.) She testified
21 she recently started chemical dependency treatment and was attending
22 AA meetings. She reported she has been diagnosed with hepatitis C,
23 and will begin treatment after three more months of sobriety. (Tr.
24; Ct. Rec. 18 at 4.) At the hearing she stated she had been clean
25 and sober for three months and had just started mental health
26 treatment that day. (Tr. 17.) She stated she could not do her past
27 work as a CNA because she cannot lift with her right arm and cannot
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1 stand for required periods of time.

2 **ADMINISTRATIVE DECISION**

3 At step one, ALJ Chester found Plaintiff had not engaged in
4 substantial gainful activity during the relevant time. (Tr. 42.)
5 At step two, he found Plaintiff had the severe impairments of PCT,
6 diffuse arthralgias, major depressive disorder, alcohol abuse and
7 cannabis abuse. (*Id.*) At step three, he determined Plaintiff's
8 substance abuse disorder met the requirements of sections 12.09 and
9 12.04 of 20 C.F.R., Appendix 1, Subpart P, Regulations No. 4
10 (Listings), and with the alcohol abuse disorder, Plaintiff was
11 disabled under the Listings. (Tr. 44-45.)

12 The ALJ proceeded to a second sequential evaluation without the
13 effects of alcohol addiction and found these remaining impairments
14 were severe but did not meet the Listings: PCT, diffuse arthralgias,
15 and depression. (Tr. 43.) At step four, the ALJ found Plaintiff
16 would have the residual functional capacity (RFC) to perform light
17 work in jobs with superficial contact with the general public. She
18 could climb stairs and ramps and balance, but would be limited to
19 occasional stooping, kneeling, crouching, crawling, and climbing
20 ropes, ladders or scaffolds. She could not do frequent handling or
21 feeling bilaterally. (Tr. 46.) Based on this RFC, without the
22 effects of alcohol addition, and considering VE testimony, the ALJ
23 found Plaintiff could perform her past relevant work as a fruit
24 sorter or food server. (Tr. 49.) ALJ Chester proceeded to step
25 five and found Plaintiff's RFC would not allow her to perform the
26 full range of light work, but as testified by the VE, there were
27 other jobs in the national economy that she could perform, such as
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1 housekeeper, laundry worker, and bakery worker. (Tr. 49.) He
 2 concluded substance abuse was a contributing factor to the
 3 determination of disability, and therefore she is not considered
 4 disabled under the Social Security Act. (Tr. 50.)

5 **STANDARD OF REVIEW**

6 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
 7 court set out the standard of review:

8 A district court's order upholding the Commissioner's
 9 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
 10 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
 11 Commissioner may be reversed only if it is not supported
 12 by substantial evidence or if it is based on legal error.
 13 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
 14 Substantial evidence is defined as being more than a mere
 15 scintilla, but less than a preponderance. *Id.* at 1098.
 16 Put another way, substantial evidence is such relevant
 17 evidence as a reasonable mind might accept as adequate to
 18 support a conclusion. *Richardson v. Perales*, 402 U.S.
 19 389, 401 (1971). If the evidence is susceptible to more
 20 than one rational interpretation, the court may not
 21 substitute its judgment for that of the Commissioner.
 22 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner*, 169
 23 F.3d 595, 599 (9th Cir. 1999).

24 The ALJ is responsible for determining credibility,
 25 resolving conflicts in medical testimony, and resolving
 26 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
 27 Cir. 1995). The ALJ's determinations of law are reviewed
 28 *de novo*, although deference is owed to a reasonable
 construction of the applicable statutes. *McNatt v. Apfel*,
 201 F.3d 1084, 1087 (9th Cir. 2000).

21 **SEQUENTIAL PROCESS**

22 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
 23 requirements necessary to establish disability:

24 Under the Social Security Act, individuals who are
 25 "under a disability" are eligible to receive benefits. 42
 26 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
 27 medically determinable physical or mental impairment"
 28 which prevents one from engaging "in any substantial
 gainful activity" and is expected to result in death or
 last "for a continuous period of not less than 12 months."
 42 U.S.C. § 423(d)(1)(A). Such an impairment must result

1 from "anatomical, physiological, or psychological
 2 abnormalities which are demonstrable by medically
 3 acceptable clinical and laboratory diagnostic techniques."
 4 42 U.S.C. § 423(d)(3). The Act also provides that a
 5 claimant will be eligible for benefits only if his
 6 impairments "are of such severity that he is not only
 7 unable to do his previous work but cannot, considering his
 8 age, education and work experience, engage in any other
 9 kind of substantial gainful work which exists in the
 10 national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus,
 11 the definition of disability consists of both medical and
 12 vocational components.

13 In evaluating whether a claimant suffers from a
 14 disability, an ALJ must apply a five-step sequential
 15 inquiry addressing both components of the definition,
 16 until a question is answered affirmatively or negatively
 17 in such a way that an ultimate determination can be made.
 18 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
 19 claimant bears the burden of proving that [s]he is
 20 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
 21 1999). This requires the presentation of "complete and
 22 detailed objective medical reports of h[is] condition from
 23 licensed medical professionals." *Id.* (citing 20 C.F.R. §§
 24 404.1512(a)-(b), 404.1513(d)).

25 It is the role of the trier of fact, not this court, to resolve
 26 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
 27 supports more than one rational interpretation, the court may not
 28 substitute its judgment for that of the Commissioner. *Tackett*, 180
 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
 Nevertheless, a decision supported by substantial evidence will
 still be set aside if the proper legal standards were not applied in
 weighing the evidence and making the decision. *Brawner v. Secretary*
of Health and Human Services, 839 F.2d 432, 433 (9th Cir. 1988). If
 there is substantial evidence to support the administrative
 findings, or if there is conflicting evidence that will support a
 finding of either disability or non-disability, the finding of the
 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
 1230 (9th Cir. 1987).

ISSUES

The question is whether the ALJ's decision is supported by substantial evidence and free of legal error. Plaintiff argues the ALJ erred when he: (1) considered the effects of her alcohol addiction and found it was a contributing factor material to her disability; (2) improperly rejected medical opinions regarding her mental impairments; (3) improperly discounted her subjective testimony; (4) improperly discounted the testimony of her step-father; and (5) relied on VE testimony at steps four and five. (Ct. Rec. 18 at 9-19.)

DISCUSSION

12 A. Sequential Evaluation in the Context of Substance Addiction

13 The Contract with America Advancement Act of 1996 (CAAA)
14 amended the Social Security Act, providing that "an individual shall
15 not be considered to be disabled . . . if alcoholism or drug
16 addiction would . . . be a contributing factor material to the
17 Commissioner's determination that the individual is disabled." 42
18 U.S.C. § 423(d)(2)(C). Special statutes and regulations govern
19 disability claims that involve substance abuse.

Under the Regulations implemented by the Commissioner, the ALJ must follow a specific analysis that incorporates the sequential evaluation discussed above. 20 C.F.R. §§ 404.1535(a), 416.935(a). The ALJ must conduct the first five-step inquiry without attempting to determine the impact of substance abuse/addiction. If the ALJ finds that the claimant is not disabled under the five-step inquiry, the claimant is not entitled to benefits, and there is no need to proceed with further analysis. *Id.* If the ALJ finds the claimant

1 disabled, and there is evidence of substance addiction, the ALJ
 2 should proceed under the sequential evaluation and §§ 404.1535 or
 3 416.935 to determine if the claimant would still be disabled absent
 4 the substance addiction. *Bustamante v. Massanari*, 262 F.3d 949, 955
 5 (9th Cir. 2001). If found disabled with the effects of substance
 6 addiction, it is the claimant's burden to prove substance addiction
 7 is not a contributing factor material to her disability. *Parra v.*
 8 *Astrue*, 481 F.3d 742, 748 (9th Cir. 2007). As stated by the *Parra*
 9 court, a drug-addicted claimant "who presents inconclusive evidence
 10 of materiality has no incentive to stop [abusing drugs], because
 11 abstinence may resolve his disabling limitations and cause his claim
 12 to be rejected or his benefits terminated." *Id.* Thus, through the
 13 CAAA, Congress seeks "to discourage alcohol and drug abuse, or at
 14 least not to encourage it with a permanent government subsidy."
Ball v. Massanari, 254 F.3d at 817, 824 (9th Cir. 2001).

15 Plaintiff argues the ALJ did not evaluate her claim as required
 16 by *Parra*. She correctly asserts that the ALJ is required to "first
 17 conduct the five step process to determine whether a claimant is
 18 disabled and then must determine which of claimant's disabling
 19 limitations would remain if the claimant stopped using drugs or
 20 alcohol." (Ct. Rec. 18 at 10.) This is what ALJ Chester did. As
 21 required by the 20 C.F.R. § 416.935 and *Bustamante*, he conducted two
 22 sequential evaluations, considering Plaintiff's impairments with and
 23 without the effects of her long history of alcohol abuse and
 24 addiction. (Tr. 42-46.)

25 **1. First Sequential Evaluation**

26 At step two of the first sequential evaluation, the ALJ found
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1 Plaintiff had severe mental impairments of alcohol and cannabis
2 abuse and "major depressive disorder." Tr. 42.) At step three he
3 determined they met the Listings for §§ 12.09 (substance addiction)
4 and 12.04 (affective disorders), and she was therefore disabled.
5 (Tr. 45.)

6 The Ninth Circuit has held explicitly that where disability is
7 established with the effects of substance addiction, the "claimant
8 bears the burden of proving that drug or alcohol addiction is not a
9 contributing factor to [her] disability." *Parra*, 481 F.3d at 748.
10 Thus, if there is no evidence of disabling impairments without the
11 effects of alcohol abuse, Plaintiff is not entitled to benefits.
12 *Id.*

13 Although she does not challenge the finding of disabling
14 alcohol addiction, Plaintiff argues the evidence shows she has
15 disabling mental limitations without the effects of her alcohol
16 addiction. Specifically, she states the ALJ did not give proper
17 weight to the opinions of Julie Rickard, Ph.D., Thomas Rowe, Ph.D.,
18 and James Goodwin, Psy.D., in his second sequential evaluation. (Ct.
19 Rec. 18 at 9-10.) As found by the ALJ during the first sequential
20 evaluation, these assessments were conducted in 2006 and 2007, while
21 Plaintiff was actively abusing alcohol. (Tr. 48.) As noted by the
22 ALJ, in November 2006, Dr. Goodwin specifically diagnosed alcohol
23 abuse and depression, rule out cannabis abuse. (Tr. 206). He
24 reported Plaintiff had a ten-year history of alcohol abuse and no
25 substance abuse treatment. He assessed marked and severe functional
26 limitations, opined that Plaintiff needed a drug/alcohol evaluation
27 and needed three to six months of treatment. He also opined her
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1 alcohol abuse "significantly exacerbates" her diagnosed depression.
2 (Tr. 206-08). It is noted on review that during her interview with
3 Dr. Goodwin, Plaintiff identified alcohol abuse as a major problem
4 in her life. (Tr. 203.) Likewise, the ALJ noted Dr. Rickard's June
5 2007 letter on Plaintiff's behalf seeking financial assistance for
6 medication. The letter was written one week after Dr. Rickard's
7 first appointment with Plaintiff, at which she diagnosed depression,
8 symptoms of anxiety, suicidality and dysphoria. She opined
9 Plaintiff needed medication to overcome her mental problems, and was
10 unable to work at the time. (Tr. 43, 262.) However, other evidence
11 in the record indicates clearly Dr. Rickard became aware of
12 Plaintiff's alcohol addiction and its disabling effects.

13 For example, mental health records from Columbia Valley Health
14 Center show Dr. Rickard saw Plaintiff in January 2008, and noted
15 Plaintiff's alcohol abuse was not under control, she was threatening
16 suicide, and medication was needed. (Tr. 283-84.) Dr. Rickard,
17 reported Plaintiff "continues to drink from the time she wakes up
18 until bedtime." (Tr. 283.) In an October 2008 clinic note, primary
19 care provider, Eric Olson, M.D., referred Plaintiff to Dr. Rickard,
20 noting Plaintiff was scheduled for inpatient alcohol abuse treatment
21 in December 2008. He opined she needed to achieve "sustained
22 abstinence from alcohol" before receiving hepatitis C treatment.
23 (Tr. 281.) In December 2008, Dr. Rickard noted Plaintiff's self-
24 reported detox date as November 19, 2008. (Tr. 288.) Clinic notes
25 from that period also show the attending nurse practitioner
26 questioned the credibility of Plaintiff's self-reported sobriety
27 during an office visit. (Tr. 278.)

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1 Reports from Dr. Rowe also show Plaintiff was actively abusing
2 alcohol at the time Dr. Rickard opined Plaintiff was unable to
3 work.¹ In August 2007, Dr. Rowe administered a complete battery of
4 psychological tests and diagnosed Plaintiff with dysthymia; alcohol
5 abuse; major depression disorder, recurrent; and a learning disorder
6 with math and spelling deficits. (Tr. 245, 249-52.) As found by
7 the ALJ, Dr. Rowe reported Plaintiff was actively abusing alcohol
8 and "essentially spent her entire day drinking beer." (Tr. 44,
9 247.) It is also noted on review that Plaintiff acknowledged her
10 alcohol addiction in her interview with Dr. Rowe, and reported she
11 had consumed ten to twelve beers daily for the past ten years. (Tr.
12 247.) According to Dr. Rowe, Plaintiff admitted "with all the beer
13 she was drinking the [anti-depressant] medication really was not
14 providing relief to her depression and so it was discontinued." (Tr.
15 253.) Significantly, Dr. Rowe opined that Plaintiff would not be
16 amenable to treatment with medication until after she went through
17 alcohol detox and treatment. (*Id.*) He found she was alcohol
18 dependent and "at least moderately depressed." (*Id.*) He opined she
19 should be sober for six months before she would be sufficiently
20 responsible to manage her money. (*Id.*)

21 The ALJ's consideration of medical evidence from Drs. Rowe,
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23 ¹ At the January 15, 2009, hearing, Plaintiff testified she had
24 just started seeing Dr. Rickard again for mental health treatment.
25 (Tr. 17.) When asked how often she saw Dr. Rickard, she reported
26 she had not seen her since she quit drinking, and explained Dr.
27 Rickard said "when I quit drinking to come back and it'll be
28 better." (*Id.*)

1 Rickard and Goodwin is without error. Because the reports clearly
2 indicate Plaintiff was abusing alcohol at the time, and medical
3 providers opined the excessive use of alcohol has exacerbating her
4 mental problems and her PCT, their opinions were properly credited
5 during the first sequential evaluation. (Tr. 207, 252-53, 258.)
6 These credited medical opinions support unequivocally the ALJ's
7 conclusion that Plaintiff's depression and alcohol abuse meet the
8 Listings under §§ 12.09 (substance addiction) and 12.04 (depressive
9 disorder).² (Tr. 44.)

10 **2. Second Sequential Evaluation**

11 The ALJ proceeded to the second evaluation as required by
12 *Bustamante*, and found Plaintiff's depressive disorder was severe,
13 but did not meet the Listing. (Tr. 46.) Plaintiff appears to argue
14 she also has severe impairments of dysthymia and disorder of written
15 expression and mathematics that, without the effects of alcohol
16 abuse, are disabling. She relies on the limitations assessed by
17 Drs. Rickard, Rowe and Goodwin, who explicitly noted Plaintiff's
18 active abuse of alcohol. (Ct. Rec. 19 at 10-11.) Therefore, the
19 ALJ did not err in giving little weight to these limitations in his
20 evaluation of impairments without the effects of alcohol addiction.
21 20 C.F.R. § 416.935; *Bustamante*, 262 F.3d at 955.

22 _____
23 ² Other evidence indicates she was actively abusing alcohol
24 during the relevant period. For example, in November 2006, Plaintiff
25 was found intoxicated in the street by police and taken to Central
26 Washington Hospital. (Tr. 192-93.) Emergency room personnel noted
27 "toxic effects of alcohol" and suicide ideation in the triage
28 report. (Tr. 192.)

1 **3. Plaintiff's Burden of Proof**

2 Although the ALJ must consider evidence of remaining
3 impairments without the effects of alcohol addiction, under *Parra*,
4 the burden is shifted in the second sequential evaluation to
5 Plaintiff to show that alcohol addiction is not a contributing
6 factor material to her disability. Plaintiff has presented no
7 medical evidence that her mental impairments are disabling without
8 the effects of alcohol abuse. She presents no records of abstinence
9 or alcohol addiction treatment during the claimed period of
10 disability. On the contrary, she testified at the hearing that she
11 had started mental health treatment the day of the hearing, and had
12 been abstinent from alcohol for three months.³

13 There is nothing in the record to show Plaintiff's mental
14 impairments are irreversible with an extended period of abstinence.
15 Thus, she has not met her burden to show that alcohol abuse is not
16 a contributing factor to her disabling mental impairments. See
17 *Parra*, 481 F.3d at 750. The ALJ's application of the two step
18 sequential evaluation required when substance addiction is a factor
19 is without error.

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21 ³ Assuming this testimony is accurate, Plaintiff has not met
22 the durational requirement for a disability. 20 C.F.R. § 416.905.
23 For an impairment to be meet or equal a listing, the impairment must
24 last or be expected to last for a continuous period of 12 months.
25 The record should document all pertinent symptoms, signs and
26 laboratory findings as well as prescribed treatment, and the
27 response to treatment in terms of changes in symptoms. *SSR 82-52*
28 (Documentation).

1 **B. Credibility**

2 Although resolving questions of credibility are functions
 3 solely of the Commissioner, *Sample v. Schweiker*, 694 F.2d 639, 642
 4 (9th Cir. 1982), when the adjudicator finds a claimant's statements
 5 regarding the severity of impairments and limitations are not
 6 credible, he or she must make a credibility determination with
 7 findings sufficiently specific to permit the court to conclude the
 8 ALJ did not arbitrarily discredit claimant's allegations.
 9 *Richardson*, 402 U.S. at 400; *Thomas v. Barnhart*, 278 F.3d 947, 958-
 10 59 (9th Cir. 2002); *Bunnell v. Sullivan*, 947 F.2d 341, 345-46 (9th
 11 Cir. 1991) (en banc); *Fair v. Bowen*, 885 F.2d 597, 604 (9th Cir.
 12 1989). To reject a claimant's subjective complaints, the ALJ must
 13 provide "specific, cogent reasons for the disbelief." *Morgan v.*
 14 *Commissioner of Social Sec. Admin.*, 169 F.3d, 595, 599 (9th Cir.
 15 1999) (quoting *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir.
 16 1990)). If there is no affirmative evidence of malingering, the
 17 reasons must be "clear and convincing." *Lester v. Chater*, 81 F.3d
 18 821, 834 (9th Cir. 1995). "[O]nce the claimant produces objective
 19 medical evidence of an underlying impairment, an adjudicator may not
 20 reject a claimant's subjective complaints based solely on a lack of
 21 objective medical evidence to fully corroborate the alleged severity
 22 of [disabling symptoms]." *Bunnell*, 947 F.2d at 345.

23 In the second sequential evaluation, the ALJ found Plaintiff's
 24 remaining impairments could reasonably cause her alleged symptoms,
 25 but found her statements were not entirely credible. (Tr. 47.)
 26 Referencing specific evidence in the record to support his findings,
 27 the ALJ gave numerous, specific reasons for discounting her
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1 subjective complaints. (Tr. 47-48.) He found her statements were
2 not consistent with the medical evidence and none of her providers
3 stated her physical problems precluded employment. Other
4 inconsistencies noted were: she stopped taking care of her
5 grandchildren for economic rather than health reasons; her claimed
6 inability to be around people was not so severe as to preclude her
7 recent participation in alcohol addiction treatment; and her
8 statements about her ability to perform household chores and take
9 care of her grandchildren were inconsistent with the report from her
10 stepfather. These are "clear and convincing" reasons to discount
11 a claimant's statements. *Tonapetyan v. Halter*, 242 F.3d 1144, 1148
12 (9th Cir. 2001); *Thomas*, 278 F.3d at 958-59.

13 In addition, the record shows Plaintiff reported successful
14 treatment for her PCT and intermittent problems when exposed to
15 sunlight; examining physicians noted inactive PCT, and assessed mild
16 to moderate problems with her back. (Tr. 175-76, 259.) Further
17 support of the ALJ's credibility findings is Plaintiff's failure to
18 pursue and comply with treatment recommendations. *Fair v. Bowen*,
19 885 F.2d 597, 603 (9th Cir. 1989). Dr. Rowe reported Plaintiff knew
20 alcohol consumption was impeding treatment for her depression, but
21 she quit the medication instead of abstaining or seeking alcohol
22 abuse treatment. (Tr. 253.) As stated by Plaintiff, Dr. Rickard
23 told her she needed to stop drinking before her depression could be
24 treated successfully. (Tr. 17.) Because the ALJ's credibility
25 determination is reasonably supported by the evidence, it is
26 affirmed.

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1 **C. Lay Testimony**

2 Plaintiff claims the ALJ improperly rejected the statements of
3 her step-father, George Kelley, in his third-party witness statement
4 dated February 2007 (Tr. 141-49.) Plaintiff references only Mr.
5 Kelley's statements that "a few years back [she had] nickel size
6 blisters all over her hands and feet." (Ct. Rec. 18 at 17; Tr.
7 148.) An independent review of Mr. Kelley's statements indicates he
8 observed this condition affected her ability to walk and use her
9 hands. He stated she did normal daily housework, and estimated she
10 could lift 25 pounds, which is more than required of light work,
11 walk 10 to 12 blocks, and pay attention for 10 minutes. He
12 indicated he had not observed any changes in her hobbies or
13 interests since the blistering condition began. (Tr. 141, 145-46.)

14 Lay witness testimony as to a claimant's symptoms or how
15 impairments affect her ability to work is competent evidence and
16 must be considered by the ALJ. If lay testimony is rejected, the
17 ALJ "'must give reasons that are germane to each witness.'" *Nguyen*
18 *v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996) (citing *Dodrill v.*
19 *Shalala*, 12 F.3d 915, 919 (9th Cir. 1993)). ALJ Chester considered
20 Mr. Kelley's statements and gave them little weight because he was
21 not medically trained. This is not a valid reason for ignoring lay
22 testimony, because, by definition, a lay witness is not a medical
23 professional. Standing alone, Mr. Kelley's close relationship with
24 Plaintiff is not a valid reason for disregarding his observations,
25 although the Commissioner has advised it is a factor to consider in
26 weighing the evidence. *SSR* 06-3p. Finally, the ALJ found Mr.
27 Kelley's observations were not consistent with the medical evidence,
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1 but did not identify specific inconsistencies. The ALJ failed to
 2 give specific, germane reasons for discounting Mr. Kelley's
 3 statements. *See Bruce v. Astrue*, 557 F.3d 1113, 1116 (9th Cir.
 4 2009).

5 Independent review shows Mr. Kelley's observations are relevant
 6 to the period when Plaintiff was actively abusing alcohol, which
 7 according to Dr. Barber, could contribute to the PCT symptoms. (Tr.
 8 260.) Even if Mr. Kelley's testimony is credited in the first
 9 sequential evaluation, it does not change the ALJ's second
 10 sequential evaluation in which he found Plaintiff not disabled
 11 "without the effects of alcohol abuse." Therefore, the ALJ's error
 12 is harmless. *Johnson v. Shalala*, 60 F.3d 1428, 1436 n.9 (9th Cir.
 13 1995). Mr. Kelley's observations in 2007 while Plaintiff was
 14 actively abusing alcohol are not relevant to the second sequential
 15 evaluation, and they do not support Plaintiff's claim that her
 16 disabling mental limitations would remain if she stopped abusing
 17 alcohol. 20 C.F.R. § 416.935.

18 **D. Residual Functional Capacity**

19 Plaintiff argues the ALJ erred in the weight given to Dr. Brent
 20 Barber's opinion that she is capable of light work, and did not
 21 properly credit the opinion of Gary Gaffield, D.O., who endorsed a
 22 sedentary RFC. (Ct. Rec. 18 at 13.) She also claims limitations
 23 assessed by agency psychologist Eugene Kester, M.D., were "separate
 24 from any substance abuse," and the ALJ erred when he failed to
 25 explain how much weight was given Dr. Kester's RFC findings. (Ct.
 26 Rec. 18 at 12.) These arguments are without merit.

27 The RFC determination represents the most a claimant can still
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1 do despite his physical and mental limitations. 20 C.F.R. §§
2 404.1545, 416.945. The RFC assessment is not a "medical issue"
3 under the Regulations; it is based on all relevant evidence in the
4 record, not just medical evidence. *Id.* The RFC determination
5 represents dispositive administrative findings regarding a
6 claimant's ability to perform basic work and may direct the
7 determination of disability. 20 C.F.R. § 416.946; *SSR* 96-5p.
8 Because the RFC assessment is part of the sequential evaluation,
9 critical to a finding of disability and eligibility for benefits,
10 the final responsibility for determining a claimant's RFC rests with
11 the Commissioner after consideration of the record in its entirety.
12 *Id.* When RFC findings and final determination reflect a rational
13 interpretation of the evidence, the court may not substitute its
14 judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097.

15 In assessing the RFC, an adjudicator must consider all medical
16 evidence provided. No special significance is given to a medical
17 source opinion on the issues of RFC and disability, issues reserved
18 to the Commissioner. 20 C.F.R. § 416.927(e); *SSR* 96-5p; *SSR* 96-2p.
19 While a treating source opinion is never entitled to controlling
20 weight, these opinions may never be ignored. However, the ALJ need
21 only explain why "significant probative evidence has been rejected."
22 *Vincent v. Heckler*, 739 F.2d 1393, 1395 (9th Cir. 1984). Because Dr.
23 Kester's opinions are consistent with the ALJ's RFC determination
24 (see Tr. 242), and were credited in the Commissioner's decision (Tr.
25 48 (Exhibit 9F)), no further explanation of the weight given is
26 required.

27 Plaintiff claims the ALJ erred because he referred to Dr.
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1 Barber as a primary care physician; however, in this case, this is
2 a distinction without a difference. Both Dr. Gaffield and Dr.
3 Barber are acceptable medical sources and examining physicians. 20
4 C.F.R. § 416.927(d). Neither opinion is given special significance
5 in the ALJ's RFC assessment. *SSR 96-5p*. If an examining doctor's
6 opinions are not contradicted, they can be rejected only with "clear
7 and convincing" reasons. *Lester v. Chater*, 81 F.3d 821, 830 (9th
8 Cir. 1995). If contradicted, the ALJ may reject an opinion if he
9 states specific, legitimate reasons that are supported by
10 substantial evidence. See *Flaten v. Secretary of Health and Human*
11 *Serv.*, 44 F.3d 1453, 1463 (9th Cir. 1995). Here, the ALJ rejected
12 neither opinion.

13 As required by the Regulations, the ALJ considered Dr. Barber's
14 March 2006 report, specifically noting that at the time of the
15 examination, Plaintiff's PCT was controlled. (Tr. 48.) Dr.
16 Barber's report also shows that Plaintiff stated she experienced
17 discomfort primarily when her hands were exposed to sunlight. (Tr.
18 259.) Dr. Barber also felt Plaintiff's alcohol consumption could
19 contribute to her PCT. (Tr. 260.) He indicated she was nonetheless
20 capable of "light work" which was defined on the form report as "the
21 ability to lift 20 pounds maximum and frequently lift and/or carry
22 up to 10 pounds, and may require walking or standing up to six out
23 of eight hours per day, or involve sitting most of the time with
24 occasional pushing and pulling of arm and/or leg controls." (Tr.
25 257.) This summary is supported by substantial evidence, including
26 Mr. Kelley's statement that Plaintiff could lift about 25 pounds.
27 (Tr. 146, 255-60.)

28

1 The ALJ then summarized Dr. Gaffield's assessment, dated
2 November 9, 2006, eight months after Dr. Barber's exam. (Tr. 172-
3 77.) As indicated by the ALJ, Dr. Gaffield found no significant
4 physical problems and concluded Plaintiff "could perform work
5 consistent with light work."⁴ (Tr. 48.) Consistent with Dr.
6 Barber's exam, Dr. Gaffield noted no symptomatic hand blistering
7 typical of PCT patients. He observed mild back spasms and limited
8 cervical motion, as well as bilateral hand grip weakness. He opined
9 Plaintiff could walk, stand, and sit eight hours in an eight-hour
10 workday, capacities which are consistent with light work.
11 Nonetheless, he advised she carry no more than ten pounds
12 occasionally and ten pounds frequently due to her grip weakness in
13 her fingers and wrists. He also opined she was limited in
14 manipulative activities to occasional activity due to weakness in
15 both wrists. (Tr. 176.) These capacities are consistent with the
16 ALJ's RFC findings that Plaintiff should not do frequent handling or
17 feeling bilaterally, or perform a full range of light work. (Tr.
18

19 ⁴ The Social Security regulations define light work as work
20 that involves lifting no more than 20 pounds at a time with frequent
21 lifting or carrying objects weighing up to 10 pounds. "Even though
22 the weight lifted in a particular light job may be very little, a
23 job is in this category when it requires a good deal of walking or
24 standing--the primary difference between sedentary and most light
25 jobs." SSR 83-10. Light work may also involve sitting most of the
26 time, but with "some pushing and pulling of arm-hand or leg-foot
27 controls, which require greater exertion than in sedentary work."
28 *Id.*

1 46, 48-50.) However, they do not fit into the definition of
 2 sedentary work, as claimed by Plaintiff.⁵

3 Consistent with objective psychological testing results showing
 4 deficits in math and spelling, and problems with attention and
 5 concentration, the ALJ found Plaintiff could perform unskilled
 6 work,⁶ limited to superficial contact with the public. (Tr. 27, 50;
 7 see also Tr. 242.) (Plaintiff limited to repetitive, non-complex
 8 tasks.) The ALJ's RFC findings, without the effects of alcohol
 9 abuse, are a rational interpretation of the evidence in its
 10 entirety, and may not be disturbed.

11 **E. Vocational Expert Testimony**

12 It is not uncommon in social security cases to find an
 13 individual's exertional capacity falls between two ranges. When an
 14 exertional level falls between the light and sedentary ranges of
 15 work, and it is not clear how much an occupational base within a

17 ⁵ "Sedentary work" involves:

18 [L]ifting no more than 10 pounds at a time and
 19 occasionally lifting or carrying articles like docket
 20 files and small tools. Although sitting is involved, a
 21 certain amount of walking and standing is often necessary
 22 in carrying out he job duties. Jobs are sedentary if
 walking and standing are required occasionally and other
 sedentary criteria are met. Work performed primarily in
 a seated position entails no significant stooping.

23 SSR 83-10. Good use of the hands and fingers for repetitive hand-
 24 finger actions is required generally in unskilled sedentary jobs.

25 *Id.*

26 ⁶ Unskilled work requires little or no judgment, the ability to
 27 carry out simple instructions, and can be learned in a short period
 28 of time. See SSR 85-15.

1 range of work is eroded, the ALJ is advised to consult a vocational
2 expert to determine if a significant number of jobs remain that the
3 claimant can perform. *SSR 83-12*. Here, the ALJ properly consulted
4 with the VE, who identified several light level jobs Plaintiff could
5 perform with the identified mental and physical limitations.

6 Plaintiff argues the ALJ's reliance on VE testimony was error
7 because he did not include all of her limitations. (Ct. Rec. 18 at
8 18.) However, as discussed above, the ALJ's credibility and RFC
9 determinations are supported by substantial evidence. Further,
10 Plaintiff has not shown her alleged inability to sustain employment
11 would remain if she stopped abusing alcohol. The transcript of the
12 hearing shows the ALJ included those limitations reasonably
13 supported by the evidence, without the effects of alcohol, in his
14 hypothetical question to the VE at steps four and five. (Tr. 26-
15 27.) The VE's testimony is therefore supported by substantial
16 evidence. *Bayliss v. Barnhart*, 427 F.3d 1211, 1217 (9th Cir. 2005).
17 The ALJ did not err in relying on this testimony in his step four
18 and five findings.

19 **CONCLUSION**

20 The Commissioner's RFC and credibility determinations are
21 supported by substantial evidence and are without legal error.
22 Plaintiff has failed to demonstrate she would still be disabled in
23 the absence of alcohol addiction. The ALJ's finding that substance
24 addiction is a contributing factor material to Plaintiff's
25 disability is without legal error and supported by substantial
26 evidence. The ALJ did not err in denying Plaintiff's claim.
27 Accordingly,

28

IT IS ORDERED:

1. Plaintiff's Motion for Summary Judgment (Ct. Rec. 17) is
DENIED.

2. Defendant's Motion for Summary Judgment (Ct. Rec. 20) is
GRANTED.

The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. Judgment shall be entered for Defendant and the file shall be **CLOSED**.

DATED August 5, 2010.

S/ CYNTHIA IMBROGNO
UNITED STATES MAGISTRATE JUDGE